Supreme Court, U.S.
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No. 92-933

In The

Supreme Court of the United States

October Term, 1992

AMERICO LOPES, TRUSTEE OF THE 841 LAKE REALTY TRUST,

Petitioner,

vs.

CITY OF PEABODY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

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9 pp

QUESTIONS PRESENTED

1. Does a landowner have standing to seek compensation under the Fifth Amendment of the Constitution when a portion of his property is subject to a valid exercise of a municipality's police power to preserve a margin of safety from flood damage?

2. Does a landowner have standing to seek compensation for an alleged "inverse condemnation" of a portion of his property subjected to a valid regulation, when at the time said landowner acquired ownership of the subject property, the regulation had been in effect for more than five years and the landowner knew or should have known of its existence?

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I. A zoning regulation which is a valid exercise of a municipality's police powers enacted for purposes of public safety, namely prevention of flood damage to homes, is not a "taking" even though it may render some properties minimally usable or unusable.

On the question of reasonableness, if it is fairly debatable, every presumption is to be afforded in favor of the judgment of the local authorities who gave it its being. 3

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RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND ORDINANCES INVOLVED

The General Laws of Massachusetts, Chapter 185, Section 1 (j 1/2) and Chapter 240, Section 14A (A41-42), provides a means of relieving a particular lot, or parcel of land, from specific provisions of a Zoning Ordinance, as it applies to the Zoning District within which the lot or parcel lies. It does not provide for compensation as sought by the Petitioner.

STATEMENT OF THE CASE

In August 1981, the Petitioner bought land located on Lake Street, Peabody, Massachusetts — portions of the land were separated by a railroad, right of way, other portions of the land were separated by a pond of water known as "Devil's Dishful."

At the time the Petitioner purchased the subject land, there was in existence a Zoning Ordinance for the City of Peabody which had been enacted in 1975, and which had a "flood boundary district" and "wetlands conservancy district," (A15-18), regulating the use of properties within said district below certain stated minimum elevations above mean sea level.

The Petitioner knew or should have known of this regulation at the time of his purchase of the subject property in 1981. The Petitioner has sold as single family house lots portions of what he had originally purchased on Lake Street in 1981, and houses have been built on these sold lots.

After failing to have the Peabody City Council amend the Zoning Ordinance in 1986, the Petitioner commenced an action in the Massachusetts Land Court to seek relief from the "wetlands conservancy," and the "flood boundary district" regulations with respect to this one parcel of land. There may also be other zoning restrictions that could adversely affect this parcel which were noted in the Land Court case but were not addressed (A14-15).

The Land Court (A9-26), and the Appeals Court (A27-39) and the Supreme Judicial Court of the Massachusetts (A40) have all rejected the Petitioner's arguments, and have in fact found that the regulations contained in the Peabody Zoning Ordinance were not a "taking" under the Fifth and Fourteenth Amendments of the Constitution and were in fact a reasonable exercise of the City's

police power to maintain public safety from flood damage (A20-21).[1]

REASONS FOR DENYING THE WRIT

I.

A ZONING REGULATION WHICH IS A VALID EXERCISE OF A MUNICIPALITY'S POLICE POWERS ENACTED FOR PURPOSES OF PUBLIC SAFETY, NAMELY PREVENTION OF FLOOD DAMAGE TO HOMES, IS NOT A "TAKING" EVEN THOUGH IT MAY RENDER SOME PROPERTIES MINIMALLY USABLE OR UNUSABLE.

ON THE QUESTION OF REASONABLENESS, IF IT IS FAIRLY DEBATABLE, EVERY PRESUMPTION IS TO BE AFFORDED IN FAVOR OF THE JUDGMENT OF THE LOCAL AUTHORITIES WHO GAVE IT ITS BEING.

The reduction or elimination of the beneficial uses of property, imposed by a Zoning Ordinance, by itself, does not entitle someone to a due process judgment under the Fifth and Fourteenth Amendments. It must be shown that the purpose of the law is not rationally related to the reasonable promotion of public safety.

In *Goldblatt v. Hempstead*, 369 U.S. 590, 8 L. Ed. 2d 30 (1962), a town ordinance which prohibited excavation below 2 feet above maximum groundwater level was held not to cause a "taking" of property which constitutionally required compensation. In that case the ordinance was found to be a valid

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1. There was absolutely no evidence at the time of trial concerning the taking, as such, *i.e.*, value, ownership, prior compensation, statute of limitations, etc.

exercise of the town's police powers and the mere fact that it deprived the property of its most beneficial use did not render it unconstitutional. It was further found that the owners had failed to carry their burden of showing that the ordinance was an unreasonable exercise of its police power.

Both the Land Court and the Appeals Court of Massachusetts have made the same findings as the *Goldblatt* case, *supra* (A18-21 and A33-35), with respect to the reasonableness of the City of Peabody's Zoning Ordinance finding that it was a valid exercise of its police power to prevent damage to property by flooding. *See also, Turnpike Realty Co. v. Dedham,* 362 Mass. 221, 233-235 (1972), where the public interest, outweighed the landowner's loss by restriction in use of his land, and was not a taking.

II.

TO HAVE STANDING TO CLAIM COMPENSATION FOR AN INVERSE CONDEMNATION "TAKING" IT IS NECESSARY THAT THE CLAIMANT HAVE A PROPERTY INTEREST IN THE PROPERTY ALLEGEDLY TAKEN.

In the cases decided by the United States Supreme Court, involving takings, the party seeking compensation has been an owner of property, or someone with a property interest of some sort, at the time of the so-called "taking."

The Petitioner in making his argument against this point of view cites *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987), suggesting that you do not have to own, or have a property interest in land to sustain an action for a taking. You can acquire the land after the so-called "taking" and have a right of action.

These are not the facts of the *Nollan* case, *supra.* In that case

the Nollans had an option to purchase certain property and a condition of the purchase was the removal of a structure which came under the jurisdiction of the California Coastal Commission. The regulations that were appealed from by the Nollans were imposed directly on them after they applied for their permit. Further, the restriction, in the form of an easement, was unique to their property.

The instant case involves a general zoning regulation that applied to a complete district and had been in effect five years when the Petitioner bought his property. Therefore, he knew or should have known at the time of purchase that there was a restriction. *See MacNeil v. Avon*, 386 Mass. 339 (1982). Petitioner would not be entitled to compensation for a taking, even if the Zoning Ordinance did not qualify as one "in the public interest," because he had no right, title or interest in the property at the time the Zoning Ordinance was enacted.

CONCLUSION

The Petitioner's Writ of Certiorari should be denied based on the decisions of the Land Court, the Appeals Court and the Supreme Judicial Court of Massachusetts, with all of the reasons stated therein, as well as the reasons submitted herewith.

Respectfully submitted,

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